IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 435

A. ELWOOD NORTH,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR REHEARING

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Comes now A. Elwood North, Petitioner in the above-entitled cause, and presents this petition for a rehearing of such cause, and, as grounds therefor, respectfully urges the following:

I. The Procedures Followed by the State of Florida Violated the 1st and 14th Amendments to the Constitution of the United States.

II. A Case of First Impression, Involving Grave Constitutional Questions Upon the Resolution of

Which Petitioner's Life Depends, and Involving Problems of Vital and Recurring Importance Throughout the United States, Should Not Be Determined by a One-Line, Per Curiam Decision Containing No Indication of the Grounds for the Decision.

III. This Court Overlooked Its Decision in the Case of *Mattox v. United States*, 146 U.S. 140.

I. The Procedures Followed By the State of Florida Violated the 1st and 14th Amendments.

This is a substantial ground available to Petitioner though not previously presented.

The 1st Amendment, as applied to the States by the 14th, forbids any State from making any law "respecting an establishment of religion" or from prohibiting the "free exercise" of religion.

The record in this case shows without dispute that at the request of Juror Grigsby (R. 1493-1494), the bailiff of the State Court brought a Baptist preacher into the jury's private and segregated dining room to speak to the jury. While there, the preacher read from his Bible and asked the jurors to become Christians (R. 1489, 1519). Thus, the State in this case adopted a procedure whereby jurors, who were gathered together by the State for the purpose of performing a duty imposed upon them by the State, were asked to adopt a particular type of religious faith. It is submitted that such a procedure clearly vio-

lates the "Constitutional standard" of "separation of Church and State." *Zorach v. Clauson*, 343 U.S. 306, 315. As in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, the force of the State was used to promote sectarian religious tenets. This Court in compliance with the commands of the 1st and 14th Amendments should not affirm, especially without discussion or criticism, the State's use of such a procedure in any trial, and particularly not in a capital case. If there is any time when the claims of God and the claims of Caesar should be separated, if there is any time when the wall between Church and State should stand invincibly as a barrier, it is in such a case, involving life and death. To permit a State to inject even the slightest degree of sectarian religion into capital trials is to open the door to abuses which will undercut our most cherished and hard-won liberty: the right to worship God according to our own beliefs.

II. A Case of First Impression, Involving Grave Constitutional Questions Upon the Resolution of Which Petitioner's Life Depends, and Involving Problems of Vital and Recurring Importance Throughout the United States, Should Not Be Determined By a One-line, Per Curiam Decision Containing No Indication of the Grounds for the Decision.

The action of this Court in affirming Petitioner's conviction and sentence to death attracted nation-wide interest. See *Time*, January 25, 1954, p. 23; *Newsweek*, January 25, 1954, p. 27. Many newspapers throughout the country specifically commented on the fact that this

Court issued only an unsigned order with no explanatory opinion. See, e. g., *New York Herald Tribune*, January 19, 1954 (Associated Press Report). This widespread interest underscores the fact that the basic questions involved in this case are of paramount importance to each of the forty-eight States of the United States. They concern the permissible limits within which States may experiment with criminal procedures under the 14th Amendment. If the other forty-seven States of the Union are free to adopt the procedures which the State of Florida employed in this case, it is respectfully submitted that this Honorable Court should inform the other States of this freedom by an opinion giving its reasons for so construing the 14th Amendment, rather than by a per curiam decision: "The judgment is affirmed."

Moreover, the reasons for writing an opinion in this case are especially compelling because this is a case of first impression before this Court. Respondent, the State of Florida, stated in its brief (p. 11) that the problem raised in this case "has never been before this Court." Petitioner so informed this Court at oral argument. Apparently this Court likewise came to such a conclusion, for contrary to its usual practice in rendering per curiam decisions, it failed to cite a single prior opinion as a basis for its ruling.

This Court has repeatedly stated that it is not concerned with the wisdom of State experimentations in the field of criminal procedure, but only with their Constitutionality. The questions before this Court in this case concerned only that basic issue: the Constitutionality of

the procedures by which Petitioner's right to life was taken from him.

Briefly, the procedures followed by Florida were simple. The State charged Petitioner with a crime. It assembled twelve men in a body and committed to that body the responsibility of deciding after a trial whether or not (1) Petitioner was guilty, and (2) if guilty, whether or not he should die for the crime. During the time required to present its case in open court before this body of twelve men (under civilized rules of procedure adequately safeguarding the accused and giving him a chance to defend himself), the State by law isolated the group from all other, extraneous influences — that is, all except *one*, the influence of an itinerant Baptist preacher. Petitioner does not contend that due process requires a State to isolate and segregate a jury in this fashion. But he does submit that if the State chooses to follow such a course, it cannot make exceptions and thereby channel and funnel extraneous influences upon a jury.

Nevertheless, in this case the State of Florida (acting as a State must always act, through its officials) decided to make an exception. In this case, the State of Florida (acting through its bailiff) kept from the jury all extraneous influences except *one* which it deliberately, at the request of one juror, sought out and brought to the jury without notice to Petitioner, without his consent, and without an opportunity for him to be present.

It is this procedure which Petitioner contends does not measure up to the standard of basic fairness pre-

scribed by the due process clause of the 14th Amendment. Yet, it is this procedure in every shocking detail, which the Supreme Court of the United States has affirmed. By its failure to write an opinion this Court has, in effect, adopted the action of the inferior courts as its own, and has given the dignity of the nation's most solemn and august judicial tribunal to each and every phase of the proceedings below, for this was not a mere denial of certiorari, but a decision of this Court. In theory it cannot be said that it would be any less controlling as a precedent than *Marbury v. Madison*, 1 Cranch 137.

It may be argued that such a procedure is not one which Florida ordinarily follows. This is true. But the State did follow it in this case, involving the only life Petitioner has. If the procedure is Constitutional for Petitioner, why would not it be Constitutional for all defendants charged by States with crime?

It may be argued that the bailiff's action was not the action of the State. But the bailiff was an officer of the trial court and an officer of the State; he was acting in his official capacity when he brought the Baptist preacher into the jury's private dining room. Speaking of the 14th Amendment, this Court has stated:

> "Whoever, by virtue of public position under state government deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; *and as he acts in the name and for the State, and is clothed with*

> *the State's authority, his act is that of the State.* This must be, or the constitutional prohibition has no meaning." *Ex parte, Commonwealth of Virginia*, 100 U.S. 339, 347; *Neal v. Delaware*, 103 U.S. 370, 397. (Emphasis added.)

It may be true that a violation of due process committed by one State agency may be corrected or prevented by another agency of higher authority. See *Frank v. Mangum*, 237 U.S. 308, 328. But here the violation was accomplished and the trial completed before discovery of its occurrence. It is submitted that the only remedy which could have possibly restored to Petitioner his right to a fair trial in this situation was the granting of a new trial. But this remedy, higher authority in the State of Florida refused to grant.

For the above reasons Petitioner submits (1) that the procedures followed by the State of Florida in this case were not in conformity with due process of law as protected by the 14th Amendment and that the judgment of the Supreme Court of Florida should not have been affirmed; (2) that in any event, a judgment involving grave Constitutional questions, upon the resolution of which Petitioner's very life depends, in a case of first impression and in a case which has attracted nationwide interest — that such a judgment should not be entered without an opinion of the Court or at least the citation of some reason for the judgment.

III. This Court Overlooked Its Prior Decision in the Case of Mattox v. United States, 146 U.S. 140.

The State of Florida in this case cast the full burden of proving actual prejudice upon Petitioner. Thus, the State first called in a preacher to speak to the jury without notice to the Petitioner, without his consent, and without giving him a chance to be present. Then, after Petitioner's conviction and after he had fortuitously discovered that this occurrence happened, the State informs him that he must prove what transpired at a meeting he could not possibly have attended and for which he was in no way responsible, and furthermore, must bear the burden of proof that such events actually prejudiced the jury against him. Instead of this Florida rule, Petitioner submits that the procedural rule which conforms to due process and a traditional American sense of fairness in a situation such as this is the one announced by this Court as applicable to all Federal Courts:

> "It is vital in capital cases that the jury should pass upon the case free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated. Hence, the separation of the jury in such a way as to expose them to tampering, may be reason for a new trial, variously held as absolute; or prima facie, and subject to rebuttal by the prosecution; or contingent on proof indicating that a tampering really took place. Wharton, Crim. Pl. and Pr., Secs. 821, 823, 824, and cases cited.

> *"Private communications, possibly prejudicial, between jurors, and third persons,* or witnesses, or the officer in charge, *are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is made to appear." Mattox v. United States,* 146 U.S. 140, 149-150. (Emphasis added.)

Petitioner met the only burden which he could within reason be expected to sustain in a situation such as this: he showed clearly and conclusively (1) two private communications addressed by a preacher to the whole jury, and (2) that the communications were possibly prejudicial. Indeed, Petitioner submits that he went further and showed conclusively that on the undisputed facts the preacher's two communications to the jury *were* highly prejudicial to him. Yet, nevertheless, the State under Florida law was never called upon to bear any burden of showing the harmlessness of the meeting for which it was responsible.

In the light of the *Mattox* case it is readily seen that each of the cases relied upon by Respondent in his brief on this so-called "preacher point" are clearly distinguishable. The three State cases cited by Respondent (*State v. Kinsauls,* N.C., 36 S.E. 31; *State v. Pancoast,* N.D., 67 N.W. 1052; *Chilton v. Commonwealth,* Ky., 186 S.W. 191) each involved instances wherein the jury attended a church or religious revival open to the public. Thus the communications were open and above-board, not private and clandestine as in the instant case.

Moreover, in two of the State cases the accused had expressly consented to the jury's action beforehand. *State v. Kinsauls*, supra; *State v. Pancoast*, supra. Thus, in those cases the accused had ample notice and an opportunity to be present. If any consent were given in the case at bar, it was admittedly only consent for the jurors to attend a church open to the public if and when they *all* could agree upon which church to attend. Also admittedly, the jurors were not able to so agree (R. 1487).

The only other case relied upon by Respondent in his brief on this point is *Morgan v. United States*, 7th Cir., 31 F. 2d 385, cert. den., 280 U.S. 556. While that case did involve a private, clandestine communication with one juror, it did not involve the other requirement specified in the *Mattox* case: the communication there was clearly one which could not possibly have been prejudicial. As stated in the opinion:

> "The most that the affidavit in the instant case shows is that the [Catholic] priest administered the sacrament of communion to the juror." 31 F. 2d at p. 388.

It is a matter of common knowledge that the sacrament of communion in the Catholic faith is administered in the Latin language and is standardized in form. Thus, in that case it was possible to reconstruct exactly what transpired at the time of the private communication and to show that the occurrence was not possibly prejudicial. Not so in the instant case. Neither the State nor Petitioner was able to discover all that the preacher read or said to the jury, but it was shown that he did read from a Psalm

which states six times that the wicked shall be cut off or cut down and refers eleven times to the destruction of evil doers. Indeed, the circumstantial evidence of *actual* prejudice (to say nothing of *possible* prejudice) is far stronger than the circumstantial evidence upon which Petitioner was found guilty.

CONCLUSION

Upon the foregoing grounds, Petitioner respectfully prays that this Honorable Court grant a rehearing in this cause and order that this case be set down for re-argument.

In the alternative, and only in the event this Court sees fit to deny this petition for rehearing, Petitioner prays that this Honorable Court enter an order vacating its per curiam decision and its order granting the petition for certiorari in this case and substitute therefor an order denying the petition for certiorari so that this Court will be free at some future time, when perhaps the pressure of judicial business will permit more leisure for deliberation, to consider these same or similar questions, should they arise again, unhampered by a silent, enigmatic precedent.

Respectfully submitted,

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By_____
Of Counsel

BLEED THROUGH POOR COPY

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, but in the interests of justice.

Of Counsel

I hereby certify that a copy of the foregoing petition for rehearing was served upon Respondent, the State of Florida, by mailing of copy thereof, postage prepaid, to the Attorney General, State of Florida, Tallahassee, Florida, this 1st day of February, 1954.

Of Counsel